

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

MARK EISTER

WARRANT FOR ARREST

CASE NUMBER: 06ms81

To: The United States Marshal and any Authorized
United States Officer

YOU ARE HEREBY COMMANDED to arrest Mark Eister

and bring him or her forthwith to the nearest magistrate judge to answer a(n)

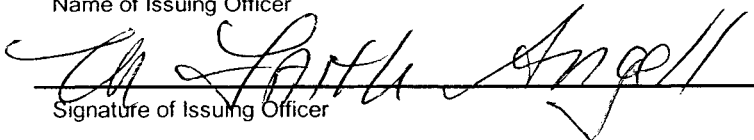
☐ Indictment ☐ Information ☒ Complaint ☐ Order of court ☐ Violation notice ☐ Probation violation petition
charging him with (brief description of offense)

From in or about November 2003 through in or about October 2005, defendants Leonard Luchko, Mark Eister, and other persons known and unknown to the United States Attorney, conspired and agreed together to commit an offense against the United States, that is, to obstruct justice by destroying electronic evidence, including e-mail communications pertaining to matters within the scope of a federal criminal investigation, and engaged in various overt acts in furtherance of the conspiracy, in violation of Title 18, United States Code, Section 1519.

In violation of Title 18, United States Code, Section 371.

Honorable M. Faith Angell

Name of Issuing Officer



Signature of Issuing Officer

United States Magistrate Judge

Title of Issuing Officer



Date and Location

Philadelphia, PA

Bail fixed at \$ _____ by _____
Name of Judicial Officer

RETURN

This warrant was received and executed with the arrest of the above-named defendant at _____

| | | |
|----------------|---|--------------------------------|
| DATE RECEIVED | NAME AND TITLE OF ARRESTING OFFICER Special Agent Vicki Humphreys Federal Bureau of Investigation | SIGNATURE OF ARRESTING OFFICER |
| DATE OF ARREST | | |

J. Pease and R. Zauzmer Authorizing

| | | | |
|---|--|--|----------------------------------|
| United States District Court | | DISTRICT Eastern District of Pennsylvania | |
| UNITED STATES OF AMERICA v. MARK EISTER | | DOCKET NO. MAGISTRATE'S CASE NO. 06m581 | |
| Complaint for violation of 18 U.S.C. § 371 (Conspiracy) | | | |
| NAME OF JUDGE OR MAGISTRATE Honorable M. Faith Angell | | OFFICIAL TITLE U.S. Magistrate Judge | LOCATION Philadelphia, PA |
| DATE OF OFFENSE 2003-2005 | PLACE OF OFFENSE Pennsylvania and New Jersey | ADDRESS OF ACCUSED (if known) 4605 N. Clearview Drive Camp Hill, Pennsylvania 17011 | |
| COMPLAINANT'S STATEMENT OF FACTS CONSTITUTING THE OFFENSE OR VIOLATION: From in or about November 2003 through in or about October 2005, in violation of Title 18, United States Code, Section 371, defendants Leonard Luchko, Mark Eister, and other persons known and unknown to the United States Attorney, conspired and agreed together to commit an offense against the United States, that is, to obstruct justice by destroying electronic evidence, including e-mail communications pertaining to matters within the scope of a federal criminal investigation, and engaged in various overt acts in furtherance of the conspiracy, in violation of Title 18, United States Code, Section 1519. | | | |
| BASIS OF COMPLAINANT'S CHARGE AGAINST THE ACCUSED: See Affidavit Attached Hereto. | | | |
| MATERIAL WITNESSES IN RELATION AGAINST THE ACCUSED: | | | |
| Being duly sworn, I declare that the foregoing is true and correct to the best of my knowledge. | | SIGNATURE OF COMPLAINANT (official title) Vicki Humphreys OFFICIAL TITLE Special Agent Federal Bureau of Investigation | |
| Sworn to before me and subscribed in my presence. | | | |
| SIGNATURE OF MAGISTRATE ⁽¹⁾ Honorable M. Faith Angell, United States Magistrate Judge | | DATE 5/26/06 | |

1) See Federal Rules of Criminal Procedure rules 3 and 54.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

WARRANT FOR ARREST

LEONARD LUCHKO

CASE NUMBER: 06ms82

To: The United States Marshal and any Authorized
United States Officer

YOU ARE HEREBY COMMANDED to arrest Leonard Luchko

and bring him or her forthwith to the nearest magistrate judge to answer a(n)

☐ Indictment ☐ Information ☒ Complaint ☐ Order of court ☐ Violation notice ☐ Probation violation petition
charging him with (brief description of offense)

From in or about November 2003 through in or about October 2005, defendants Leonard Luchko, Mark Eister, and other persons known and unknown to the United States Attorney, conspired and agreed together to commit an offense against the United States, that is, to obstruct justice by destroying electronic evidence, including e-mail communications pertaining to matters within the scope of a federal criminal investigation, and engaged in various overt acts in furtherance of the conspiracy, in violation of Title 18, United States Code, Section 1519.

In violation of Title 18, United States Code, Section 371.

Honorable M. Faith Angell

United States Magistrate Judge

Name of Issuing Officer

Title of Issuing Officer

Signature of Issuing Officer

Date and Location

Philadelphia, PA


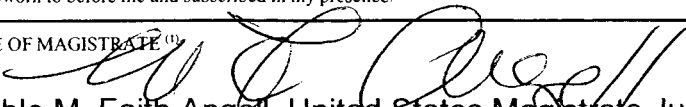
Bail fixed at \$ _____ by _____
Name of Judicial Officer

RETURN

This warrant was received and executed with the arrest of the above-named defendant at _____

| | | |
|----------------|---|--------------------------------|
| DATE RECEIVED | NAME AND TITLE OF ARRESTING OFFICER Special Agent Vicki Humphreys Federal Bureau of Investigation | SIGNATURE OF ARRESTING OFFICER |
| DATE OF ARREST | | |

J. Pease and R. Zauzmer Authorizing

| | | | |
|---|--|--|----------------------------------|
| United States District Court | | DISTRICT Eastern District of Pennsylvania | |
| UNITED STATES OF AMERICA v. LEONARD LUCHKO | | DOCKET NO. MAGISTRATE'S CASE NO. <div style="text-align: right; font-size: 1.2em;">06m582</div> | |
| Complaint for violation of 18 U.S.C. § 371 (Conspiracy) | | | |
| NAME OF JUDGE OR MAGISTRATE Honorable M. Faith Angell | | OFFICIAL TITLE U.S. Magistrate Judge | LOCATION Philadelphia, PA |
| DATE OF OFFENSE 2003-2005 | PLACE OF OFFENSE Pennsylvania and New Jersey | ADDRESS OF ACCUSED (if known) 1108 Meadowbrook Lane Collingdale, Pennsylvania | |
| COMPLAINANT'S STATEMENT OF FACTS CONSTITUTING THE OFFENSE OR VIOLATION: From in or about November 2003 through in or about October 2005, in violation of Title 18, United States Code, Section 371, defendants Leonard Luchko, Mark Eister, and other persons known and unknown to the United States Attorney, conspired and agreed together to commit an offense against the United States, that is, to obstruct justice by destroying electronic evidence, including e-mail communications pertaining to matters within the scope of a federal criminal investigation, and engaged in various overt acts in furtherance of the conspiracy, in violation of Title 18, United States Code, Section 1519. | | | |
| BASIS OF COMPLAINANT'S CHARGE AGAINST THE ACCUSED: <div style="text-align: center; font-size: 1.1em;">See Affidavit Attached Hereto.</div> | | | |
| MATERIAL WITNESSES IN RELATION AGAINST THE ACCUSED: | | | |
| Being duly sworn, I declare that the foregoing is true and correct to the best of my knowledge. | | SIGNATURE OF COMPLAINANT (official title)  Vicki Humphreys OFFICIAL TITLE Special Agent Federal Bureau of Investigation | |
| Sworn to before me and subscribed in my presence. | | | |
| SIGNATURE OF MAGISTRATE (1)  Honorable M. Faith Angell, United States Magistrate Judge | | DATE <div style="font-size: 1.5em;">5/26/06</div> | |

1) See Federal Rules of Criminal Procedure rules 3 and 54.

AFFIDAVIT

I, SPECIAL AGENT VICKI HUMPHREYS, having being duly sworn, depose and state the following:

I. INTRODUCTION

1. I make this affidavit in support of a criminal complaint and arrest warrant charging Leonard Luchko and Mark Eister with conspiring to destroy records in order to obstruct justice, in violation of Title 18, United States Code, Section 371.
2. I am a special agent employed by the FBI, and have held this position for approximately 11 years. During this time, I have either conducted or participated in numerous investigations concerning criminal violations of, among other provisions, Title 18, United States Code, Sections 371 (conspiracy), 666 (bribery involving federal programs), 1341, 1343, and 1346 (mail, wire, and honest services fraud), 1951 (Hobbs Act extortion), and 1956 (money laundering). I have participated in the execution of numerous search warrants and arrest warrants involving investigations ranging from public corruption cases to money laundering and fraud offenses.
3. I, along with other special agents of the FBI and special agents of the IRS, have, since early 2003, conducted a criminal investigation into the activities of a non-profit corporation (referred to herein as the "Organization")¹ that is organized and managed by and through the South Philadelphia district office of a Pennsylvania

¹ Consistent with Department of Justice policy, *see* U.S.A.M. § 9-27.760, I am excluding from this affidavit the actual names of uncharged persons and entities who may have been involved in wrongdoing or have other privacy interests.

State Senator (referred to herein as the "Senator"), as well as other companies and individuals associated with the Organization. During the period of approximately January 1, 1999 to the present, various individuals associated with the Organization are believed to be involved in committing criminal offenses, including the following: Title 18, United States Code, Sections 1951 (extortion), 371 (conspiracy), 1341, 1343, and 1346 (mail, wire, and honest services fraud), 1503, 1512, and 1519 (obstruction of justice), and Title 26, United States Code, Sections 7206(1) (submitting a false federal tax return) and 7206(2) (aiding, counseling, or advising in the preparation of a federal tax return which is fraudulent or false as to any material matter).

4. I am familiar with the circumstances of the offenses described in this affidavit, through a combination of discussions with other FBI special agents; discussions with IRS special agents; discussions with FBI and IRS employees who have obtained information that they have reported to me; information from cooperating witnesses; witness interviews that I have conducted as part of this investigation; analysis of records produced and testimony provided in response to grand jury subpoenas; analysis of bank and other financial records; public records checks; and information gained from my own knowledge, training, and experience. This investigation is ongoing at this time.
5. The complaint and warrant alleges a conspiracy, among Luchko, Eister, and other persons known and unknown to the United States Attorney, to violate federal law, all in violation of Title 18, United States Code, Section 371. Specifically, the

complaint alleges a conspiracy to violate Title 18, United States Code, Section 1519, which became effective on July 30, 2002, and which prohibits the destruction of records with the intent to obstruct justice. Section 1519 provides that:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

6. It is my understanding that Section 1519 was adopted in 2002 as part of the Sarbanes-Oxley Act, in response to a wave of alleged corporate frauds including that concerning Enron Corporation. It is my understanding that the purpose of Section 1519 was to clarify and broaden the prohibition on destruction of records with the intent to hamper a federal investigation. Specifically, the author of Section 1519, United States Senator Patrick Leahy, wrote:

Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States, or such acts done either in relation to or in contemplation of such a matter or investigation. The fact that a matter is within the jurisdiction of a federal agency is intended to be a jurisdictional matter, and not in any way linked to the intent of the defendant. Rather, the intent required is the intent to obstruct, not some level of knowledge about the agency processes or the precise nature of the agency or court's jurisdiction. This statute is specifically meant not to include any technical requirement, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter by intent or otherwise. It is also sufficient that the act is done "in contemplation" of or in relation to a matter or investigation. It is also meant to do away with

the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title. Destroying or falsifying documents to obstruct any of these types of matters or investigations, which in fact are proved to be within the jurisdiction of any federal agency are covered by this statute. Questions of criminal intent are, as in all cases, appropriately decided by a jury on a case-by-cases basis. It also extends to acts done in contemplation of such federal matters, so that the timing of the act in relation to the beginning of the matter or investigation is also not a bar to prosecution. The intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function. Finally, this section could also be used to prosecute a person who actually destroys the records himself in addition to one who persuades another to do so, ending yet another technical distinction which burdens successful prosecution of wrongdoers.

148 Cong. Rec. S7418-01, at S7419 (July 26, 2002).

7. As explained in detail below, Leonard Luchko, Mark Eister, and others, upon learning that the Senator by whom they were employed was the subject of a federal investigation, persisted in and significantly increased efforts to destroy all e-mail regarding the Senator maintained by employees of the Organization, by employees of the Senator's office, and by others, so that such e-mail could not be recovered by federal investigators. This conspiracy was successful, in that Luchko, Eister, and others successfully engaged in widespread destruction of such e-mail. While the government has therefore been denied access to much e-mail relating to the Senator and the Organization, we have been able to establish, through other e-mail which was preserved, the existence of the conspiracy to destroy e-mail. This affidavit describes a number of e-mail communications related to the conspiracy. Except as noted below, all of these communications were located on computer

equipment or in e-mail accounts assigned to Luchko, Eister, or Person No. 1 (a co-worker of Luchko's who aided in the maintenance of the Senator's computer equipment). With very few exceptions, the e-mails described below were never found in more than one location; in other words, it was frequently the case that many parties to a particular e-mail discarded their copies, but the government was able to recover the one copy which remained in an account of one of these individuals. Thus, while the e-mails kept by any one of these persons might not have been sufficient to depict the full story of the conspiracy to obstruct justice, the sum of the e-mails is.

II. THE INVESTIGATION

8. This ongoing investigation has focused in part on whether and to what extent the Senator has used his authority and official position to attempt to demand and obtain payments to the Organization from two large corporations in connection with Public Utility Commission litigation that he intervened in against these corporations, and the extent to which the Senator has benefitted, both politically and personally, from expenditures made by the Organization. The investigation seeks to determine whether the Senator engaged in extortion, in violation of Title 18, United States Code, Section 1951, in demanding contributions from the two corporations. The investigation further seeks to determine whether the Organization, in violation of the restrictions placed on charitable organizations, has spent money for the Senator's personal benefit and for political activities inconsistent with the Organization's limited mission and tax-exempt status.

9. The Senator's office and the Organization are nominally independent entities. However, a central question in this investigation is the extent of control which the Senator exercises over the Organization, in order to direct its expenditures.
10. In conducting this grand jury investigation, the government has sought to obtain all pertinent e-mail and other correspondence involving the Senator which would shed light on the extent of his management and control of the Organization.
11. Witnesses have stated that the Senator is very computer-savvy, and corresponds with his staff and others extensively by e-mail, using personal computers, laptop computers, and Blackberry communication devices. He maintains an office in Harrisburg inside the State Capitol, and a Philadelphia office on Tasker Street. He obtains computer assistance from an entity of the State Senate called Senate Democratic Computer Services (SDCS), which provides computer assistance to all Democratic members of the Senate. Two Senate employees assigned to SDCS, Leonard Luchko and Person No. 1, were, during the period relevant to this complaint, assigned to the Tasker Street office on a full-time basis, to assist the Senator and his staff. Mark Eister, another Senate employee assigned to SDCS, assisted the Senator's Harrisburg office.

III. EFFORTS TO DESTROY E-MAIL AT THE SENATE OFFICE AND ELSEWHERE

12. The grand jury investigation regarding the Organization began in approximately February 2003. Between February 2003 and May 2003, the government issued grand jury subpoenas to more than 20 third-party institutions seeking financial

records regarding the Organization; at least one of these institutions had a policy of notifying its customer regarding the receipt of a subpoena for records.

13. A series of articles in the *Philadelphia Inquirer* began on November 23, 2003, concerning the Organization, and raised a series of questions regarding the manner in which the Senator obtained funding for the Organization, including \$17 million in donations by a public utility company.
14. The articles triggered concerns by the Senator of possible law enforcement scrutiny, and the Senator's computer services employee Leonard Luchko began taking immediate steps to delete any e-mail concerning the Senator held on computers of the State Senate, the Organization, and others. On December 1, 2003, Luchko wrote an e-mail (a cc of which was sent to the Senator) to 24 members of the Senator's staff and Senate contractors in Philadelphia, including the Executive Director of the Organization, who was also the Senator's deputy chief of staff at the time:²

This is to inform all of you that under ANY circumstance are you to save any email from or to the Senator. This would include all mail you receive from him in your "IN" box and all mail you sent to him that is stored in your "Sent Items". If you need help getting rid of this mail or you need help checking your "IN" Box or SENT ITEMS Box contact [Person No. 1] or myself.

² All of the e-mails and other materials quoted in this affidavit bear the same spelling, punctuation, grammar, etc., as found in the originals of these documents, except where brackets have been used in order to exclude the actual names of uncharged persons and entities from appearing in the excerpt. For example: [the Senator].

The Executive Director replied directly to Luchko in response to this e-mail, and inquired, "What's this about again?" Luchko then replied to the Executive Director as follows:

[The Senator] called me into his office today and told me to start going around and checking everyone's Computer and make sure they were not saving his mail. I am just sending this email to give everyone a heads up. He also told me to check for sensitive Excel files but I am not doing that because how the hell I am supposed to know what is or is not sensitive.

15. On Friday, January 23, 2004, Person No. 11, who was at the time one of the Senator's aides in Harrisburg and who had some involvement in maintaining office computers there, authored an e-mail to Luchko requesting information on the "anti-key logger" program that Luchko uses "for the boss," stating that "I want to get up to speed on how that shit works." Anti-key logger programs are used to detect key-logging software and hardware devices. Key-logging utilities are used to capture every keystroke that is pressed onto a keyboard. They are often utilized to capture user's passwords or any information that the user inputs into the computer system. Anti-key logger programs are designed to detect these applications and make the user aware of their existence. Individuals who may suspect that their computer system is vulnerable to this technology may install this anti-key logging software for added security measures.³

³ Person No. 1, who was granted immunity, testified before the grand jury that the Senator became very concerned in 2004 that the FBI might utilize an electronic surveillance program known as "Carnivore," which they believed to be a key-logger program.

16. On Sunday, January 25, 2004, the *Inquirer* ran a front-page article headlined, "FBI Probes [the Senator's] Deal." The Senator and his staff were aware of the article at least as early as Saturday, January 24, 2004, the day before its publication date. A political consultant ("Person No. 2") wrote an e-mail to the Senator that day confirming that he had spoken to an *Inquirer* reporter, who was "absolutely convinced that we are under investigation based on the fact he thinks his sources are credible."⁴
17. Person No. 2 testified before the grand jury that he and the Senator would "closely monitor" on a "minute by minute basis" the articles that appeared in the *Philadelphia Inquirer* and the *Philadelphia Daily News* that related to this criminal investigation. Person No. 2 also testified that the Senator and his staff were concerned beginning on January 25, 2004 that the FBI was conducting a criminal investigation of the Senator.
18. On the afternoon of Sunday, January 25, 2004, Luchko and Person No. 1 (Luchko's colleague on the computer staff in the Senator's Philadelphia office) traded e-mails in which Luchko asked if Person No. 1 had a scanner available. Luchko wrote at 2:14 p.m., "Bring the scanner to work he waants me to keep a scanner at home because I am on 24 7 call. I am on my way to Work now to scan

⁴ As stated earlier, the e-mails described in this affidavit, except where noted, were found only in computer equipment or accounts assigned to computer technicians Luchko, Eister, and Person No. 1. This January 24, 2004 e-mail is one of the exceptions. When the FBI conducted a search on February 18, 2005 of the computer equipment at the Senator's offices in Harrisburg and Philadelphia, a single copy of this e-mail was located in the "Sent Items" folder of one of the Senator's Harrisburg aides.

articles out of the Sunday paper.” Person No. 1 then asked, “What’s the big deal with the paper anyway,” and Luchko answered, “He is being investigated by the FBI.”

19. At 10:20 p.m. that night, Luchko sent an e-mail to many staff members and Senate contractors, with a copy to the Senator. It stated:

The Senator asked me to inform the staff that until further notice we will be stepping up security.

- All email sent to [the Senator] until further notice should be sent using PGP.
 - Anyone who is currently using a Blackberry is to refrain from sending ANY sensitive information on it.
 - Anyone who is using a Blackberry is to set up a time with [Person No. 1] or myself so we can wipe them.
 - Anyone who is using a Laptop is to set up a time with [Person No. 1] or myself so we can run security updates.
- If anyone has ANY questions contact [Person No. 1] or myself and we will be happy to answer them for you.

20. At about the same time, Luchko sent a separate message to Person No. 1, Eister, and Person No. 11:

The FBI probe into the Senator has really set him off he wants us to do a number of security checks starting tomorrow. Mark I told him you were in training but he wants you to check all of our machines in Harrisburg and the servers as well. Perhaps we can get [Person No. 11] to check his personal computers and you can check the other stuff when you get back from Training. He wants all of the Blackberries wiped and [Person No. 1] and I have to bring in all laptops and do DOD wipes on them etc. Shit has defiantly hit the fan.

Person No. 11 responded: “I will take care of the personal pc’s in harrisburg tomorrow. Mark - give me a call tomorrow and we can discuss the best way to go about taking care of the other stuff.”

21. At approximately 10:29 p.m. that same evening, Person No. 11 authored an e-mail to Luchko in which he inquired whether Luchko had sent the e-mail instructing staff to delete the Senator's e-mail to the Senator's staff members in Harrisburg, to which Luchko then responded four minutes later: "Just our staff in Philly. I don't know who has what equipment in Harrisburg." Person No. 11 replied two minutes later and stated: "Neither do I . . . I will have to get with Mark and make sure we get this message to the staff."
22. Witnesses have informed me that PGP is an encryption program for e-mail correspondence. Thus, Luchko's first e-mail on this date refers to using encryption to send messages to the Senator. However, at the time encrypted messages could not be read on a Blackberry device, which is why Luchko suggested that users not send any sensitive information at all on a Blackberry.
23. Luchko's e-mails also referred to a "wipe" of Blackberries and laptop computers used by the Senator's staff. A "wipe" involves the use of a program to assure that deleted e-mails and other files cannot be recovered from a computer. When a computer user empties his or her deleted items folder, all or part of such a document may and usually does remain in "unallocated space" on the computer's hard drive, and remains there unless that space is later used. A "wipe" endeavors to scramble the entire unallocated space so that no deleted materials may be recovered. A "DOD wipe" refers to a wipe meeting Department of Defense standards, which involves seven passes on the hard drive to assure that nothing recoverable remains. Person No. 1, who was granted immunity and testified

before the grand jury concerning these efforts, was questioned regarding these events:

Q. What was the objective of these efforts to wipe the computers, what was the purpose?

A. It's to make sure that the data was unrecoverable.

Q. What was the concern as expressed to you as by Luchko concerning making sure it wasn't recoverable?

A. That the hardware could be confiscated by the FBI.

24. Person No. 1 also testified before the grand jury that, after the newspaper articles discussing an FBI investigation began to appear, he and Luchko had numerous discussions regarding the Senator's fear that the FBI would seize computer equipment at his offices:

Q. So why did he [*i.e.* Luchko] have the concern, did he say?

A. . . . He would, he would say, he would say that the boss said, the Senator said information that, him saying that he got information from the Senator that we were going to have equipment seized, that the FBI was going to show up.

25. On Monday, January 26, 2004, the Senator wrote to Person No. 1, Luchko, and Eister: "As I was encrypting a simple e-mail to [the Executive Director of the Organization] the program shut down. This has not happened in a while but now that we are stepping up security I will be using PGP a lot more!"

26. On January 26, 2004, one of the Senator's aides in his Harrisburg office wrote an e-mail to Luchko at 1:12 p.m. in which he requested that Luchko e-mail to him the anti-key-logger software "in case it is not loaded on his laptop in Hummelstown."

I know from facts gathered in the course of this investigation that the reference to "Hummelstown" is a reference to the Senator's former residence in Hummelstown, Pennsylvania.

27. The following day, when Luchko stated that he was working on the Senator's e-mail problem, the Senator wrote, "For some reason it is working much better now! ??? Maybe the Feds have finished setting up their taps! :-)" Eister then wrote, "I updated the email gateway software. That was the fix." The Senator replied, "OK But maybe I am paranoid but how did it happen in the first place and what security measures do we currently have in place both physical and electronic???" Luchko wrote, "[Person No. 1] and I have no idea what security is in place in Harrisburg that would be a question for Mark." The Senator responded, "Well get on it NOW!!!" Eister then wrote a long e-mail evaluating the problem. He said, "I wish I was in the office this week but this training is security training and will be very usefull in the current situation. I have a few new ideas on securing the network from just the past two days." Eister explained that the Senator's e-mail traffic had been "safe" through the domain utilized by the Senator, but that use of cable modems had created problems. "If email gets locked down by ISPs due to spam concerns and you must use their email server you are vulnerable to Carnivore email scanning by the feds." Eister proposed a solution, and the Senator replied, "I don't understand a lot of this because it is beyond my Computer competence and I have no idea what a VPN connection is but if it enhances security then let's go with it ASAP!!!!"

28. On Tuesday, January 27, 2004, at 9:39 a.m., in response to a complaint by Eister that his Blackberry could not receive messages, Luchko wrote to Eister, "OK I was able to wipe most of our Blackberries without incident."
29. On February 4, 2004, at 9:32 a.m., Person No. 11 authored an e-mail to Person No. 1 and Eister in which he suggested a conference call to discuss "security concerns" and stated that the persons who should be on the conference call should include Person No. 11, Person No. 1, Eister, and Luchko.
30. On February 12, 2004, at 9:05 a.m., Luchko wrote an e-mail to the Executive Director of the Organization in which he stated, "I am going to have to get my hands on your Blackberry in order to wipe it I have to then resync it over here when is a good time for me to come and get it."
31. On March 4, 2004, Luchko corresponded with an executive at the company that makes the PGP software. Luchko inquired whether, following a "7 Pass PGP free space wipe," someone could tell when the wipe was run. He was referring to the process of wiping the "free space" on a computer, where deleted items might still reside, and doing it seven times to assure success. "f I wiped a computer and the next day someone confiscated would they be able to tell it was wiped at all?" The executive replied that an examiner would see that the drive was wiped given the absence of data. The executive wrote: "I can't help you . . . Lets hope they are not sophisticated enough to notice."
32. Luchko had additional, similar correspondence with other PGP employees the following week. He stated that the wipe in question was run on Wednesday,

March 3, 2004. Another PGP employee wrote, "There would be no data older than last Wednesday, which would make a sophisticated party suspicious that a wipe might have been run."

33. On March 9, 2004, the *Philadelphia Inquirer*, in a story headlined, "Prosecutors widen probe of [the Senator's] deals," reported that "Federal prosecutors recently subpoenaed Peco Energy Co. for details of two secret deals with [the Senator] in which the utility donated \$17 million to a non profit group run by aides of the South Philadelphia democrat, the Inquirer has learned. The subpoenas from the U.S. Attorney's Office expand an inquiry that started in January, when FBI agents began interviewing people about [the Senator's] dealings with Verizon Communications." The Senator's communications and political consultant, Person No. 2, e-mailed the story to the Senator that same day and an exchange of e-mail ensued concerning the story and the fact that PECO – not the Senator – had received grand jury subpoenas.
34. On April 6, 2004, Luchko wrote an e-mail to Person No. 1 stating: "I ran pgp wipe on maryann Jamie and [the Senator's] PC make sure they finished." Person No. 1 confirmed to me that "maryann Jamie" refers to two staffers of the Senator.
35. On April 28, 2004, a grand jury subpoena was served upon the Organization requesting, among other things, e-mail communications among and between the Senator, the Organization's Executive Director, and other persons regarding the approval and payment of certain expenses incurred by the Organization. In the months following the issuance of the subpoena, the Organization produced more

than 10 boxes of records, including original invoices, checks, and bank records. But conspicuously, a limited amount of e-mail was produced in response to the subpoena, and the e-mail that was produced appeared to be e-mail that had been printed out and attached to invoices or other documents prior to service of the subpoena.

36. Person No. 14, a close friend of the Senator, testified before the grand jury that, within a few days after the April 28, 2004 grand jury subpoena was served on the Organization, the Senator had a copy of the subpoena and spoke to Person No. 14 about the subpoena. Person No. 14 testified that the Senator did not say anything about the ongoing efforts of Luchko, Eister, and others to delete e-mail and wipe computers, however.
37. On May 6, 2004, the *Philadelphia Inquirer* reported that the FBI had served a subpoena on the lobbying firm S.R. Wojdak & Associates requiring production of records involving its work with respect to the PECO Energy Co. and Verizon Communications matters in which the Senator was involved. The *Philadelphia Daily News* also reported that day that IKEA and Penns Landing Corp. had also been subpoenaed in connection with the ongoing probe of the Senator.
38. A forensic examination determined that on May 6, 2004, a PGP wipe was run on the Senator's office computer on Tasker Street.⁵

⁵ As will be discussed later at length, the government on February 18, 2005 obtained a search warrant and seized computer evidence at the Philadelphia and Harrisburg offices of the Senator. An FBI forensic examiner later examined this evidence, as well as other computer evidence obtained in later months, determining in

39. On May 7, 2004, the *Philadelphia Inquirer* reported that “federal prosecutors have subpoenaed records from the sprawling network of nonprofits backed by the powerful Democrat as well as from accountants that review their finances.” The article also stated: “The recent flurry means that prosecutors have issued at least 11 subpoenas as part of their grand-jury investigation. The U.S. Attorney's Office in Philadelphia waited until after [the Senator's] big win in the Democratic primary April 27 to issue the latest round of subpoenas, demanding information from Inter Ikea Systems B.V., Penn's Landing Corp., four other nonprofit organizations, and two accounting firms.”

40. The effort to delete e-mail involving the Senator continued during this period. On May 10, 2004, Luchko wrote to Person No. 5, an aide to the Senator:

You need to clean your mailbox up. You have over 1200 unopened emails and you also have email to and from the Senator you absolutely have to get rid of that. If you want we can set your laptops up to pull mail that way you wouldn't accumulate so much mail on the main PC but that mail from the Boss needs to be deleted!

After Person No. 5 apologized, Luchko wrote, “You really have to clean your mailbox up this is the kind of shit that can get us in trouble.”

41. On May 21, 2004, the *Philadelphia Inquirer* published a story with the headline “[The Senator's] Probe Moves to Harrisburg” and which stated in part: “Federal investigators have extended their probe into [the Senator's] dealings to the state Capitol, where FBI agents this week began trying to unravel the taxpayer grants

part when wipes were run.

the powerful legislator helped funnel to a Philadelphia maritime museum.” In the weeks following publication of this article, as explained in more detail below, there was an increased emphasis placed on “computer security” in the Senator’s Harrisburg office and significant efforts were initiated to ensure that the Senator’s e-mail could not be recovered there by the FBI.

42. On May 25, 2004, Luchko wrote to Person No. 4, the supervisor of Senate

Democratic Computer Services:

The Senator wants us to get some type of utility to really clean our PC’s and laptops we are currently using PGP Free Space wipe and that works well but he wants us to be able to do a more thorough cleaning Registry Keys orphan files etc. We also have to be able to use it on active computers.

He then suggested that SecureClean is a good product, and Person No. 4 replied to ask how many copies he wanted. Person No. 1 testified before the grand jury that SecureClean was purchased and was used to wipe the computers of the Senator’s staffers. A forensic examination of Luchko’s office computer conducted by FBI forensic examiner Justin Price confirms that this wiping software was installed on June 2, 2004. Forensic analysis also confirms, as explained later, that SecureClean and PGP Free Space wipe programs were installed and used to wipe computers of the Senator’s staff in both Harrisburg and Philadelphia.

43. On June 3, 2004, FBI Special Agent Kathleen McAfee, IRS Special Agent Ernest Binder, and I visited the offices of the Organization for the purpose of reviewing documents that were being made available for inspection as a result of the April 28, 2004 grand jury subpoena that was served on the Organization. After

reviewing the files, I told the attorney representing the Organization that I wanted the originals of all of the files that were shown to us with the exception of one box of records.

44. On June 7, 2004, Luchko wrote to Eister,

The Boss said the one thing he wants done in Harrisburg is to make sure email to and from him is deleted on a Weekly basis so whatever you put in your email to him and me make sure that is addressed.

45. On the same day, Person No. 4 wrote to Luchko, "Is [the Senator] there?" When Luchko replied that he was, Person No. 4 answered, "good - because [Person No. 1] shared with [Person No. 12, an employee of SDCS] that 'HE' was driving him nuts and I figured it was you -- must be [the Senator]." Luchko replied, "Boss is driving us ALL nuts with this FBI madness. I life just got so complicated it isn't even funny and the killer is I can't tell anyone about it."⁶

⁶ Forensic examiner Price was able to recover from the hard drive of the computer of one of the Senator's top political consultants a deleted June 8, 2004 e-mail exchange that sheds light on the Senator's state of mind during that time and his grave concerns regarding the investigation. This computer was not one of the computers to which Luchko and other Senate employees had regular access. In this e-mail, the Senator wanted his political consultant to try to find out from an attorney representing one of the companies that settled PUC litigation against the Senator, which litigation is a subject of this investigation, what its employees were telling the government. When the political consultant reported back to the Senator that the attorney would probably not tell him anything because of concerns about attorney-client privilege, the Senator responded angrily:

I understand that. That is what they told our guys already!!! FRIENDS are supposed to help FRIENDS!!! Not give them that kind of bullshit!!! NO ONE is ever going to tell the fucking client ANYTHING!!! But if that is the way they want to be to a freind then fuck them. Ask anyway, so that we will know if we have a future friend or an enemy in your current friend!!! There is no middle ground on this one!! You know how serious and almost life threatening this is. So

46. Person No. 4 sent an e-mail a few minutes later stating:

Just say the word and we'll get what you need.
Don't you think there is a self destruct software that your PC goes belly up and writes all over itself if you don't key in a password every 48 hours? -
How imminent is this threat?

Luchko answered:

I really don't want to go into it what you don't know can't hurt you we have everything under control its just going to be a real pain for [Person No. 1] and I. That's just the way it has to be for now they (FBI) won't be around forever. Then we can go back to our normal routine.

Person No. 4 then stated:

Can you give me anything that we should be doing here that is imperative. We are doing no backups -- but as far as the people -- they are difficult to control what they have on t heir own PC's.

Luchko replied:

I already had a talk with Mark, [the Senator] actually wanted me to go up there for 3 days and make recommendations to him I told him no (Can you believe that) I said Mark knows what has to be done and he will send him ([the Senator]) an email tomorrow he asked me about Mark's loyalty and I told him it is impeccable because in my opinion it is. [The Senator] is REALLY concerned about the [Senator's] Staff in Harrisburg holding email to and from him we are not allowed to do that down here and Mark has a plan in motion.

47. Later that evening, at 7:28 p.m., Luchko wrote an e-mail to Person No. 4 titled "Venting," complaining that an unspecified personal emotional problem and "this FBI crap on top of that" made it "one of the toughest days I ever had at work." He continued:

let them know that and if they still want to fuck us or stand by and watch as we get fucked then so be it. We will nevver forget. One way or the other. And right now they owe us big time!!! TY.

He has us doing stuff that I know is going to come back and bite us in the ass. Example we had a perfect I mean perfect system for backing up the PCMCIA card with all of the Quicken, CERS, FFS everything and I had to destroy that system. I created that system and destroying it REALLY hurt because I know something is going to happen and we are going to have to go back and look at something and boom were screwed and you know who takes the heat when Data Processing things get messed up US! I am walking 1 backup tape in at a time and then bringing it home I am literally walking around with files in my pocket.that's insane, hopefully this will blow over soon but right now I am stressed. I don't blame the Senator the FBI is really coming at him hard and he is innocent I truly believe that or I wouldn't do this I have delt with the FBI before at the Navy Yard and when they can't find anything wrong they try to manufacutre stuff so they can justify the man hours and money spent on a fruitless investigation.

Later, Luchko added regarding this e-mail, "delete it after you read it."

48. Person No. 1 was questioned regarding Luchko's statement in the above described e-mail that Luchko was forced to destroy the backup system:

Q. Can you just tell us what your understanding is of the backup system that he's saying that he has to destroy?

A. The Senator had, the Senator has PC cards, PC card. It's a data card that has all his emails, all his files on it. We had a system in place where Lenny or myself would backup his card. But around this time frame the Senator decided that he was going to do all of his backups by himself.

Q. How was he going to do that?

A. We gave him another card and he was backing up the one card to the other.

Q. Backing up one card to the other, what does that mean?

A. Making a copy.

Person No. 1 also explained that the Senator's old PC cards would be wiped in order to insure that none of the deleted files on the old cards could be recovered from the new card onto which the Senator's active files were being copied.

49. On June 8, 2004, Person No. 4 wrote an e-mail sympathizing with Luchko, and offering an ear. She concluded:

WE have our job cut out for us today - I am concerned about security up here - staff here don't listen at all - staff has months of email and won't listen to deleting it - they just don't seem to care. If by days end we aren't satisfied and have backing from [the Senator] to just erase stuff for them, we might need you - I am having Mark rewrite the email to [the Senator] to get some nitty gritty to the point stuff across and we'll go from there.

Luchko answered:

[The Senator] is going to give you authority to do anything you want that's what he did with me. He REALLY wants that mail gone. The way it worked down here was if Senior staff had to keep mail for a reason such as they needed it to reference a job request or a purchase they had to check with him and he would say if it was OK but anything else he wants gone. Put it to them this way if [the Senator] goes down we all go down it worked down here.⁷

50. On June 8, Luchko also wrote:

Boss didn't think to ask you about this yesterday. What do you want to do about PITS^[8] electronically there is very little I can do it's a stand alone Network if they (FBI) come in they have what is there I have no idea what Trish keeps upstairs as far as Hard Copy but all those filing cabinets look

⁷ Person No. 1 recalled discussing the issue of job security with Luchko in the event that the Senator were to be charged, and recalled Luchko "[s]aying that if the Senator was indicted, for whatever reason the Senator was not in office that we wouldn't have our jobs."

⁸ PITS is a specialized database of campaign finance information that is maintained for the Senator by an outside Senate contractor and which the Senator uses to track campaign contributions to public officials throughout Pennsylvania.

full to me and she has all kinds of Floppy disks up there and I have no idea what they are for. I asked her if she has any sensitive data on her PC and she said no.

51. Forensic analysis of the Senator's PC cards shows that, on June 9, 2004, the Senator saved onto his PC card a June 8, 2004 memo prepared by Mark Eister in which Eister begins by stating: "Senator, I've worked with Lenny and [Person No. 4] to address security concerns for your Harrisburg staff and email server. Below is a capsule of current practices and questions for clarification." The memo to the Senator then describes a number of things of significance to this investigation. Eister notes that "[t]here is no retention policy in place so mail can be stored indefinitely." Eister also states that, "[w]ith the current server configuration; deletion of email is the user's responsibility. Email is never backed up." In noting the then-existing situation concerning e-mail and the lack of a retention policy, Eister states the following to the Senator:

We want to enforce an email retention policy. If you approve I can verify email is deleted by logging into individual email boxes to look until I can come up with an automatic deletion procedure.

With a new email policy how do I handle old email currently in users Inboxes? Do I ask them to clean it up or just delete all old email past a certain date? I recommend we announce all email older than 7 days will be deleted in 48 hours. That gives them a window to make notes of what they need to but not enough time to procrastinate and forget about it.

* * *

Desktops are subject to the following weekly maintenance:

- Email folders are compacted to reduce the chance of old email being available for recovery.
- Recycling Bins are emptied on the Desktop and in email clients.

- Hard disk cleansing programs will be installed and used to erase the freespace of a hard drive of any old data.

52. I searched through the electronic evidence in an effort to determine whether the Senator prepared any e-mail response to or otherwise commented upon Eister's memo regarding "Harrisburg security concerns" and was able to locate such an e-mail exchange. On June 9, 2004 at 9:34 p.m., Eister wrote an e-mail to the Senator in which he stated: "Senator, I assume you have reviewed the Harrisburg staff and server security notes by now and no response is tacit approval. I'd be happy to meet to review any questions or concerns you may have. A few words are often clearer than long emails. Thanks, Mark" Approximately ten minutes later, the Senator responded to Eister and stated: "Please review this with Lenny and get his input as well. Then we will QUICKLY develop a strategy!" At approximately 10:13 p.m. that same evening, Luchko e-mailed Eister and asked whether the Senator was able to read the file that Eister sent to the Senator, to which Eister responded: "Yes. The email to you was his response after reading it."
53. There is evidence that, just as Luchko had instructed the Philadelphia staff months earlier to delete all e-mail regarding the Senator, Eister took similar steps in Harrisburg in accordance with his plan stated on June 8, 2004.
54. Person No. 3 is a budget analyst on the Senator's staff in Harrisburg. Person No. 3 testified in the grand jury that the Senator's Harrisburg staff would have regular staff meetings each Monday at 11:00 a.m. With the exception of the Senator and the office receptionists, the entire Harrisburg staff would attend the Monday staff

meetings. In addition, Mark Eister and his supervisor, Person No. 4, would also attend the staff meetings. According to Person No. 3, there was a standard general format to the staff meetings and Eister, who represented Senate Democratic Computer Services at the meetings, would typically lead off the meetings with any matters he wished to present regarding computer-related issues. When finished with his agenda items, Eister and his supervisor, Person No. 4, would then leave the staff meetings.

55. Person No. 3 testified that she recalled a Monday staff meeting in which Mark Eister, in the presence of his supervisor (Person No. 4) and the Senator's Harrisburg staff, provided some instructions regarding e-mail. Person No. 3 recalls that Eister instructed the Harrisburg staff members that they should delete all e-mail to and from the Senator. Eister told the staff at this meeting that if a staff member sends an e-mail to the Senator, he or she should then go into the "Sent Items" folder in their e-mail program and delete that email to the Senator. Eister also told the staff at this meeting that he would be coming around to each person's computer to make sure that everyone was following this instruction and also to ensure that each staff member's "Deleted Items" folder was being compacted or emptied.
56. Person No. 3 testified that the instructions provided by Eister at this staff meeting were the first she had ever received concerning the retention or deletion of e-mail. Person No. 3 testified that, prior to the staff meeting, her practice was to save and not delete e-mail, including e-mail to the Senator.

57. Person No. 3 testified that she believed that the instruction to delete e-mail to and from the Senator was the result of the fact that there was a pending federal criminal investigation, as had been reported by the *Philadelphia Inquirer* on January 25, 2004. Person No. 3 testified that the instructions given by Eister made her nervous and concerned, but that she followed the instructions to the best of her ability and deleted all of her e-mail to and from the Senator. Person No. 3 also testified that, at some point in time following this staff meeting, she recalled that Eister came to her work station and told her that he needed to do some work on her computer. Person No. 3 is not certain as to what Eister did on her computer because she did not remain at her desk while he worked on her computer. She recalled that she would periodically see Eister at the computer work stations of other Harrisburg staff members of the Senator as well. Person No. 3 continued to delete the Senator's e-mail until she received a different instruction from Eister after learning through media reports that the FBI executed a search warrant at the Senator's district office in February 2005.
58. I also attempted in the course of this investigation to pinpoint the date of the weekly Harrisburg staff meeting in which Person No. 3 recalled that Eister gave instructions that the Senator's staff members there should delete all e-mail to and from the Senator. Person No. 3 recalled that it occurred at some time after the January 25, 2004 *Inquirer* article titled "FBI Probes [the Senator's] Deals." I was

able to find an e-mail dated Saturday, June 12, 2004, and which appears to have been sent by Eister⁹ to the Senator in which Eister states the following:

I have talked to Lenny about the security procedures and we are in agreement on practices with one exception. Lenny maintains a policy with the Tasker staff that no email from you can be kept beyond a reasonable time frame. If anybody wants exceptions they need the OK from you. I do not currently hold this policy with the Harrisburg staff.

I can announce this policy at the Monday morning Harrisburg staff meeting. I will tell the staff the all email from you must be removed from the mail system withing 7 days. Any exceptions must be cleared with you first.

Should I implement and announce this policy to Harrisburg staff?

59. Although I have not found any response to this e-mail from the Senator, I was able to find a Monday, June 14, 2004 e-mail exchange between Eister and Luchko, in which Eister appears to confirm that he did, in fact, instruct the staff at the weekly staff meeting that day to delete e-mail to or from the Senator. Eister stated in this e-mail: "I made the announcement this morning at the [Senator's] staff meeting and I'm not the most popular person with the staff right now." Luchko responded: "This is what I do whenever I have to pass something that is unpopular with the staff I put it all on [the Senator] and that seems to keep everyone civil to me. It REALLY works."

⁹ The version of this e-mail that I obtained shows that the e-mail is "From" and "To" Eister. This e-mail message was recovered from Eister's Outlook Inbox located on the e-mail server located in Harrisburg. It was also located in an Outlook Express Inbox file located within the SDCS user profile on the Tasker Street file server. I understand that this is likely the result of the e-mail being forwarded by Eister from one computer to another under his control.

60. Also on June 14, 2004, Luchko wrote another e-mail to Person No. 5, an aide to the Senator, indicating that Luchko was again not pleased with the results of his review of Person No. 5's e-mail files:

The Server did a scan on everyone's PST and found your PST file had a total of 249 emails in it that were to or from the Senator.
156 IN Box emails to [the Senator's e-mail address]
93 SENT ITEMS email to [the Senator's e-mail addresses]
You have to address this TODAY because the next email I sent you he gets CC on because [the Senator] wants the results of these scans and I really don't want to do that. Please Advise

Person No. 5 responded as follows: "Please tell me what I need to do. Do I need to come into the office? I'm in conshohocken for the access course." Luchko then replied, "I can delete them for you," to which Person No. 5 responded, "Please Do! Thank you!!" Luchko then responded: "Just make sure you check both of your laptops. Also make sure you check for mail that was CC to [the Senator's e-mail addresses] that hasd to be deleted also."

61. A forensic examination of Person No. 5's e-mail accounts was conducted after the Senator's office computers were seized on February 18, 2005. The results of this examination confirm that e-mail related to the Senator, *i.e.* e-mail communications sent to, received from, or copied to the Senator, was in fact deleted from the e-mail accounts of Person No. 5. For example, Person No. 5's e-mail account on the Senator's file server in Philadelphia had only 17 e-mails sent or copied to the Senator in "Sent Items," and none of these e-mails has any relevance to the investigation. There was only one e-mail copied to the Senator in Person No. 5's "In Box," and the subject of the e-mail was "Re: Wing Bowl pics." Forensic

examiner Price was also able to determine that Person No. 5 had deleted at least 127 e-mails related to the Senator and had emptied his "Trash" folder that had contained the deleted e-mails related to the Senator in order to permanently delete them. Price also analyzed Person No. 5's e-mail account on the Senator's exchange server in Harrisburg and learned that there were a total of only 37 e-mails in Person No. 5's "Inbox" and no e-mails at all that were sent to, received from, or copied to the Senator.

62. At 10:01 p.m. on June 14, 2004, Luchko wrote an e-mail to Eister, which states in part:

How did you make out with your security measures? He had us delete every email I ever sent him received from him or CC and it killed me to do it because it was all technicle stuff that I use for rreference. Everybody down here did the same thing. He is serious about this emial thing. I could care less if the FBI came in tomorrow and took every PC in the place.

63. In the meantime, on June 10, 2004, a wipe was run on one of Eister's desktop computers using PGP Free Space Wipe, and on June 11, 2004, Luchko's office computer at the Tasker Street office was wiped using SecureClean. On June 14, 2004, the same day that I believe Eister addressed the Harrisburg staff, the SecureClean wipe program was also run on the Executive Director's desktop computer at the Organization's office.

64. On July 25, 2004, Eister wrote to Luchko:

The server has not been wiped in 3+ weeks. The users are emailed to remind them they will be email audited and to keep things clean. I have made a walk through of the office to check the inboxes but people were out that day so I have no seen every inbox for sometime now.

65. On August 6, 2004, a SecureClean wipe was run on the Executive Director's Organization computer and PC card. On the same day, such a wipe was also run on one of Luchko's computers at the Tasker Street office.
66. On August 7, 2004, Luchko wrote to Eister:
- this weather we have been having is so lousy I have been running extra security checks on everyone's webmail (can't be too careful) you will be happy to know that no one from Tasker Street or our mobile users is storing mail on the server and everyone at the office is getting rid of [the Senator's] mail ASAP. How are you making out up there? How's the new house coming along?
67. Eister replied, "Staff is being very good about the email. There are a handful of emails when I do the check but they are always recent." Luchko then responded about ten minutes later: "I know at first It's a pain everyone gives you dirty looks at first but once everyone starts cooperating then its fine and now you have a very tight ship and one less thing to worry about." Person No. 1 testified in the grand jury that he and Luchko discussed with Eister the importance of ensuring that e-mail could not be recovered from the e-mail server: "Specifically I remember we talked to Mark a few times about if the server were confiscated what would be recoverable and how we can make sure that it was not recoverable."
68. Eister and Luchko then exchanged e-mails about the security of the Blackberry server. Eister wrote a long message about how that server stores and overwrites files. Luchko replied, "Wow that sounds really secure so if The FBI were to seize that server all they would see would be the last email to pass through is that correct?" No response is available.

69. On August 26, 2004, Luchko wrote an e-mail to the Senator's chief-of-staff in Philadelphia in which he reported his concerns that Person No. 13, a Senate employee in Philadelphia, was not deleting e-mail to or from the Senator. This e-mail exchange confirms that the Senator's chief-of-staff in Philadelphia was aware of the efforts to delete e-mail relating to the Senator and intended to see that it was accomplished:

[Person No. 13] called us yesterday to see if we could fix the PC she has at her office. The hard drive was bad but we managed to recover most of her files. She is ordering a new PC and in the meantime we are moving her files to her laptop. While I was setting her laptop up and moving the recovered email from her bad hard drive I noticed she had quite a bit of [the Senator's] mail on both the laptop and the file we recovered from her PC. All of the mail was from 10-2001 to 5-2002 which leads me to believe we didn't recover all of her email from the bad hard drive but it also tells me that she is not deleting the Senator's mail like she is supposed to I deleted all of it and wiped the Outlook file to remove all traces. There is no way I can check to see if she is holding more recent mail on her machine at home. I am supposed to notify the Boss if anyone is holding his mail but if I do he is going to go through the roof and I don't want to get anybody in trouble. I have told [Person No. 13] just like I have told everyone else not to save the boss's mail evidently she is not listening to me can you talk to her about it or should I just tell the Boss and let him deal with it PA.

PS She is not the only one that uses this machine up at that office so any [of the Senator's] mail she saves is available to anyone who has access to the computer.

70. The next day, August 27, 2004, the Senator's chief-of-staff replied: "I will talk to her. Also I'm going to tell her you will check her units periodically until I'm assured she is complying with policy. Please see me about this. TY."

71. Mark Eister's "Tasks" file located on the Harrisburg exchange server reflects that, on September 30, 2004, Eister completed the "[Senator] Security Measures," which had listed a "due date" of June 8, 2004.
72. On October 28, 2004, Luchko sent an e-mail to all of the Senator's Philadelphia staff, several Senate contractors, and the Executive Director of the Organization, with a cc to the Senator:

This is a reminder to EVERYONE that under no circumstances are you to save any email in your IN box or Sent Items that is sent to or received from [the Senator]. If you have mail that you think you need to save you have to contact [the Senator] and ask him about it. If you need help getting rid of your mail or just checking to see if you have any mail that you shouldn't have contact Lenny or [Person No. 1].

PS Make sure you clean out your "Deleted Items" as well.^[10]

Person No. 1 testified in the grand jury that the Senator "knew that we were deleting, that we were deleting the mail out of people's accounts. He was aware that we were doing the free space wipes." Person No. 1 also confirmed that he would not have been doing this without the Senator's "knowledge and blessing."

73. On November 15, 2004, Luchko wrote a message to Eister which stated, in part: "He is back on the email kick he had me check every PC in here to make sure no one is saving his mail. How are you making out with that up there?" Eister

¹⁰ This e-mail was located in 2005 in the equipment of Person No. 1 and Luchko, and in the "Inbox" of a single Philadelphia aide to the Senator.

responded, "People are doing a really good job of policing themselves. That makes me happy." Luchko answered, "I would let [the Senator] know."¹¹

74. A forensic examination of the Executive Director's Organization computer and PC card confirmed that a SecureClean wipe program known as "Deep Clean" was run on December 9, 2004.
75. Mark Eister's "Tasks" file located on the Harrisburg exchange server reflects that, on December 20, 2004, Eister completed work on "[Senator] Home Computer," which he describes to include "[w]ipe old computer except for OS and office." This work had a "due date" of December 15, 2004. Person No. 1's computer at the Senator's district office was wiped with the PGP wipe utility on December 29, 2004. The district office computer of Person No. 8, a member of the Senator's Philadelphia staff, was wiped with the PGP wipe utility on December 30, 2004.

¹¹ Person No. 1 testified in the grand jury about the importance of updating the Senator on the efforts to destroy e-mail:

- Q. So between you, Luchko and Eister, I assume between the three of you it was a positive thing, it would be looked upon favorably if you let [the Senator] know that everyone was following this instruction to get rid of all their e-mail, correct?
- A. Lenny was big on communication and telling the boss on, telling the boss on things like this.
- Q. He wanted Lenny, Luchko wanted [the Senator] to know that he was making sure that no one was saving their e-mail?
- A. Yes.

IV. FURTHER EFFORTS TO DESTROY THE ORGANIZATION'S E-MAIL

76. On January 19, 2005, government counsel sent a new subpoena to the Organization, along with a letter to its counsel, explaining the paucity of e-mail produced in response to the April 28, 2004 subpoena. The letter stated in part the following:

In reviewing all of the records that your client, [the Organization] produced in response to the grand jury subpoena, we noticed that very little in the way of email was produced to us. The email that was produced to us appears to be email that was printed out in hard copy form and included in a file or otherwise attached to another document, such as an invoice. As you know, the grand jury subpoena that was served upon [the Organization] required that it produce all responsive documents, including electronically stored data and email. Your client was required to search all of its electronic files for responsive records and email, even if the email was not actually printed out on a piece of paper and stored in a folder or filing cabinet or some other place.

We have obtained through our investigation from third parties and other sources numerous emails sent to or from your client that would fall well within the scope of the subpoena but which have not been produced to us by your client. We need to understand why this email was not produced to us by [the Organization], and therefore request an explanation from your client. Was a search of your client's computer hard drives and email servers conducted by a qualified data recovery expert? If so, we need to understand the procedures that were employed to search for electronic evidence and where the searches were conducted. If no search for electronic evidence was conducted, we need an explanation of why that is so. In addition, in our experience, it is often the case that email and other electronic evidence that is deleted can often be recovered and restored. FBI and IRS both have computer experts who are trained in the recovery of electronically stored communications and files, and I would like to get them involved in this process to ensure that all responsive evidence in your client's possession or control is searched for and produced to us.

77. Within the next two or three days after the January 19, 2005 letter and subpoena were sent to counsel for the Organization, that attorney discussed with government

counsel the letter, the subpoena, and whether a search had been conducted by the Organization for stored e-mail communications through an examination of the Organization's computers. The attorney stated that he had received the subpoena and discussed it with the Executive Director of the Organization. The attorney stated that his understanding was that no forensic search of the Organization's computers was ever performed in response to the grand jury subpoena because the Executive Director's practice was to routinely delete all e-mail she received after reading it. Government counsel advised the Organization's attorney that the government believed that it might still be able to recover even deleted e-mail from the Organization's computers and requested that FBI forensic examiners be permitted to examine those computers to determine whether items responsive to the subpoena could be recovered. The attorney agreed that, as a result of receiving this subpoena and the discussion concerning the government's desire to attempt to recover deleted e-mail, he would instruct the Executive Director and the Organization employees to discontinue the practice of routinely deleting e-mail pending resolution of the government's concerns.

78. Although the attorneys involved in addressing these issues advised the government that the Executive Director and Luchko were instructed not to destroy any evidence, at the same time, behind the lawyers' backs, Luchko and the Executive Director were having other conversations.
79. For example, just two days after the January 19 letter and subpoena were sent by government counsel to the Organization, on January 21, 2005, at 9:08 a.m.,

Luchko sent an e-mail to the Executive Director. It began, "After our conversation yesterday I have been giving your situation some thought." Luchko then summarized the extensive wiping he had previously done on her computer at the Organization. He stated, "Now I would like to do the same thing to your computers at home and the shore but you are going to have to let me know if it is OK." He also addressed two things he said that the Executive Director should be worried about:

1) You have a lot of old files in you're my Documents folder on all of your machines. You should let me delete all of these files except the ones on the Card and you should then go through the My Documents folder and get rid of things you don't need! You have some files that are a couple of years old!

2) You are still using a lot of Senate equipment and software. 3 laptops, 1 Desktop a printer plus all of your wireless equipment belongs to the Senate. I am pretty sure the wireless equipment is not marked but the computers and printer are defiantly marked. If they want to they can hassle you behind this because I think it is a crime for non senate people to use senate equipment isn't it? The software I am not going to worry about if they are going to get that specific than they are going to find something else.

Remember I am just playing the devils advocate here I don't want you to get blindsided.

80. Luchko's discussion of the "My Documents" folder referred to a folder on the Executive Director's computer at the Organization. He suggested to her that she should maintain documents she wanted to keep on a PC card, which is detachable from the computer, and then delete them on the desktop computer. The FBI received the Executive Director's computer and PC card on February 10, 2005, in response to the subpoena. A forensic examination of the desktop computer

revealed that the "My Documents" folder no longer contained any document files. A forensic examination of the PC card found that there were many documents retained in the "My Documents" folder, but fewer than 25 related to the business of the Organization (some dated in 1999 and 2000), and none of those mentioned the Senator or his relationship with the Organization. A forensic examination of the Executive Director's Organization computer and PC card also confirmed that a SecureClean wipe program known as "Deep Clean" was run on December 9, 2004 and August 6, 2004. This SecureClean wipe program was also run on the Executive Director's desktop computer at the Organization's office on June 14, 2004.¹²

81. While no wipe of the computer and PC card was performed after the government's January 19, 2005 letter and subpoena, there is evidence that steps were taken at that time to assure that no further wipe would be necessary. The forensic examination of the Executive Director's desktop computer found that the Executive Director maintained no e-mails on that computer at all, suggesting that by that time she was saving e-mails only on her PC card. Further, the operating system log files for the Executive Director's PC card show that a SecureClean scan was run on January 26, 2005, which is one week after the January 19, 2005 letter and subpoena described earlier in this affidavit. Although a SecureClean scan did not result in any further wiping of the Executive Director's PC card, it provided to

¹² Person No. 1, a Senate employee, testified in the grand jury that he recalled that he went to the Organization and personally wiped the computers there.

whomever reviewed the results of the scan a snapshot of what would be found on the computer equipment.¹³ My examination of the e-mail that was recovered from the Executive Director's PC card on February 10, 2005 shows that there is no e-mail to or from the Senator that concerns or relates to the Organization or any other matters that the Senator and his staff knew were being investigated. Thus, once this scan was performed, it was evident that there was no reason for Luchko to run another wipe program on the Executive Director's Organization PC card because the January 26, 2005 SecureClean scan confirmed that no relevant e-mail concerning the Senator and the Organization would be recoverable when the FBI examined the Executive Director's computer on February 10, 2005.¹⁴

82. Later on January 21, 2005, at 3:49 p.m., Luchko sent an e-mail to Eister entitled "One More thing," which stated: "Remember [Executive Director] her user name

¹³ The following text is from the SecureClean program that details what the scan will do when executed.

SecureClean can scan your computer for data that has not been cleaned from your computer. By using the SecureClean Scanner, you can quickly determine what private information is hidden on your drives and where it is located. This tool is particularly useful in making sure that specific items have been securely erased following a Clean or a Quick Clean.

¹⁴ As discussed later, a SecureClean wipe was in fact run on February 11, 2005, after the government letter and subpoena, on a computer maintained by the Executive Director of the Organization at her shore home.

As also discussed later, Luchko and the Executive Director overlooked two e-mails that remained in a "Deleted Items" folder on the PC card from earlier in the day on January 26, 2005; while these e-mails did not discuss the Senator's relationship to the Organization, they did address Luchko's effort to assure the destruction of e-mail.

was [Executive Director's e-mail address] if you have anything remotely related to her a folder whatever PGP wipe it." On Monday, January 24, 2005, at 2:16 p.m., Eister wrote to Luchko, "I searched the system before I left for the day on Friday and there was no trace of the [Executive Director's] account to take care of; everything was already gone." The FBI secured the Harrisburg server on February 18, 2005, and confirmed that no traces of the Executive Director's account remained or could be recovered.

83. On January 26, 2005, one week after the January 19 letter and subpoena was issued to the Organization and the same date on which a SecureClean scan was performed on the Executive Director's computer to determine what would be recoverable on it, Luchko wrote to the Executive Director, "I forgot to tell you that compacting your PST would not be necessary because of the WIPE I did on your PC the Secure Clean wipe cleans your PST file of all left over mail fragments." A "PST file" is one in which Microsoft Outlook e-mail is kept.¹⁵
84. Also on January 26, 2005, Luchko sent another directive to all of the Senator's Philadelphia staff and the Organization's Executive Director instructing them to destroy all e-mail involving the Senator:¹⁶

¹⁵ This e-mail was located in a "Deleted Items" folder on the Executive Director's PC card, when it was obtained by the FBI two weeks later.

¹⁶ This e-mail was located in the "Deleted Items" folder of the Executive Director's PC card, in the "Deleted Items" folder of a Philadelphia aide to the Senator, and in the "Inbox" of another Philadelphia aide, when the Senator's computer equipment in Philadelphia and Harrisburg was searched the following month.

This is a remainder to everyone to get rid of any mail you Received or Sent to [the Senator] I have also noticed that some of you have don't have your DELETED ITEMS set to empty when OUTLOOK closes this is OK but you have to make sure you empty it manually from time to time. Also your mailbox needs to be COMPACTED after you have deleted a large amount of mail. This procedure cleans up any traces of email that may still be residing in the space you just created by deleting your email. I usually take care of this myself but if you happen to delete a large amount of mail let me know and I will do it immediately for you.

Luchko's e-mail referred to the fact that, when a user simply deletes an e-mail in Outlook, the e-mail remains in a "deleted items" folder and is readily seen by anyone with access to the computer. The e-mail is only truly deleted when the deleted items folder is emptied, which can be set to occur automatically whenever the user exits the Outlook program.

85. At 11:00 a.m. on January 28, 2005, a meeting between counsel for the government, counsel for the Organization, and counsel for the Executive Director took place at the U.S. Attorney's Office. FBI forensic examiner Price was also present. During the meeting, the parties again discussed the government's desire to conduct a forensic examination of the Executive Director's computer in order to attempt to retrieve deleted e-mail and other stored electronic communications. The attorneys for the Organization and the Executive Director explained that they had discussed the forensic recovery issue with Luchko, and that Luchko had begun efforts to attempt to recover deleted e-mails.
86. Less than three hours later that same day, at 1:26 p.m., Luchko wrote to the Executive Director, "I am getting rid of this copy of your email file OK." This e-

mail was found in the "Deleted Items" folder of the Executive Director's PC card; there is no known answer.

87. On January 31, 2005, Luchko's office computer at the Tasker Street office was wiped using SecureClean.
88. In an e-mail on February 3, 2005, at 7:46 p.m., Luchko wrote to Eister, "I met with my lawyer today and the FBI tomorrow if I were you I would make sure everything is clean on [the Senator's] server they were asking me about our email where is the server etc." At 7:53 p.m., Luchko added, "They are looking for emails to and from [Executive Director] and they are pissed because I wiped her PC and destroyed her old card. I thing their last gasp is email that might have been left on the server but she hasn't used [her Senate e-mail address] since last February so I can't imagine anything from her is still around. Right" At 7:57 p.m., Eister replied, "Should have PGP's this one and not the email about PGP v8.1. I will check out the new version. [The Executive Director] has been gone a year and there is nothing left of her. I will go through the servers tonight to verify everything is looking good. Give me an update tomorrow when you done with everything." Luchko answered, "I see them at 2:45 so I will email you when I am out of there."
89. The next day, February 4, 2005, at 10:12 a.m., Luchko wrote an e-mail to Eister in which he stated, "[The Senator] will be in Harrisburg on Tuesday and Wednesday I need you to get a backup and compact his PST file OK." Eister responded: "OK. I catch him as early as possible on Tuesday." I have learned that "compacting a PST

file”¹⁷ means deleting or emptying the items from the Deleted Items folder in order to permanently delete them.

90. On February 4, 2005, the Senator’s office computer on Tasker Street was wiped using the SecureClean utility.
91. As mentioned in his February 3, 2005 e-mail to Eister, Luchko became involved in direct discussions with the government regarding the January 19, 2005 subpoena to the Organization. At 3:00 p.m. on February 4, 2005, a conference call took place to again discuss the government’s desire to conduct a forensic examination of the Executive Director’s computer and to discuss technical issues regarding the examination. I participated in this conference call, along with government counsel, Special Agent Kathleen T. McAfee (FBI), FBI forensic examiner Justin Price, Luchko, and attorneys for Luchko and the Organization. During the phone call, Luchko stated that he had downloaded from the Internet a program that would enable him to attempt to recover deleted e-mail. He did not at any time indicate that he had given instructions to the Senator’s employees or the Executive Director to delete or destroy e-mail. As a result of this phone call, the parties agreed that

¹⁷ A PST is a database of e-mail files. The e-mail files are records within the database and there is an index that points to each item. When a e-mail user empties the Deleted Items folder, the Microsoft Outlook program does not actually delete the e-mails; rather, it just deletes their listings from the index. The e-mail is still in the PST, but unrecoverable because Microsoft Outlook cannot find it without the pointer in the index. The space that each e-mail item takes up is called "whitespace." When an e-mail user compacts a PST, the item is finally and permanently removed and the whitespace is recovered, thereby shrinking the size of the PST.

Justin Price would be permitted to visit the offices of the Organization on Wharton Street in South Philadelphia for the purpose of “imaging” the hard drive of the Executive Director’s computer and PC card. The imaging process essentially involves the use of specialized equipment that makes an exact copy of the entire contents of the hard drive of a computer or PC card without disturbing or altering the original contents of the items under examination.

92. The next day, Saturday, February 5, 2005, Luchko and Eister discussed a problem with the Blackberry server. At 3:06 p.m., Luchko wrote:

I met with the FBI on Friday they asked me who I worked for and what department. They asked me questioned about the [the Organization’s] network. They asked me if I ever tried to recover mail from [the Executive Director’s] PC and how much mail I was able to recover. I have to meet with them on Wednesday night at [the Organization’s offices] I think they are going to ghost [the Executive Director’s] PC and try to recover email. Good Luck to them because they are going to need it.

At 3:14 p.m., Eister stated, in part, “As far as the FBI, glad to here they don’t want to look at the server; yet. I hope it stays that way.” At 3:18 p.m., Luchko wrote:

They can’t look at are stuff without probable cause that is why they are questioning me and hassling [the Organization] they are looking for a way in. I think they are going to be completely surprised when they check out [the Executive Director’s] PC when they get a load of the Card setup and the Keystroke monitor detector’s and Secure Clean Software along with PGP. They aren’t getting shit off that PC and once they look it over it’s the last time anyone uses that PC who knows what they might try and slip in it or on it we are not taking any chances.

93. On February 10, 2005, FBI forensic examiner Justin Price traveled to the Organization’s office and imaged the hard drive of the Executive Director’s

computer and her PC card. Leonard Luchko was present as the imaging process occurred. At 10:59 p.m. that night, Luchko reported to the Senator:

Finished with the FBI for now they showed up about 7:10 PM. There were 2 techs, Jim S., Jerald [the Executive Director's] lawyer and myself. They wanted to image all of the computers but Jim and Gerald said no because they only asked for [the Executive Director's] so they imaged [the Executive Director's] computer and they imaged the Card. Jim told them he wanted copied of everything they took at first they didn't want to give then up but they did Gerald [the Executive Director's] lawyer has the copies. They finished up around 9 and then after they left I moved the computer into the closet and then went out to the trunk of my car and got [the Executive Director's] new computer and set it up I have her old card and will give it to her next week when she gets back from Florida. I didn't want to leave it in the old computer because the closet I put it in wasn't locked. I am off to the shore tomorrow to update your computers and wipe them as well I am also going to wipe the computers at Monmouth Ave.¹⁸

The Senator replied at 11:04 p.m.: "OK TY. Give [Executive Director] a NEW card as well since they may have screwed with that as well. Were you there when they did their work or did they do it in secret? PA TY"

94. The next morning, February 11, 2005, at 6:59 a.m., Luchko wrote to Person No. 1 about the Executive Director's Blackberry: "After you sync her BB this morning tell her I think you should wipe it as well before the FBI ask for it." Person No. 1 testified in the grand jury that "I do remember wiping her Blackberry around this time frame."

95. Luchko wrote to the Senator at 11:43 a.m. on February 11, 2005:

I updated and wiped all of your computers at the shore including [the Executive Director's] at Monmoth Ave. I wasn't able to renew the virus

¹⁸ From facts discovered in the course of this investigation, I know that "Monmouth Ave." refers to Executive Director's shore house.

software because I don't have the new subscriptions yet but yours doesn't expire for another 3 weeks and when I get the new subscriptions I will just come back down and take care of them.

The Senator replied:

OK I have had that renewal problem on a number of the computers that I use. I think the one down here is up in a few days as well. Don't we have one master subscription?

96. Person No. 1 testified that he recalled that Luchko did in fact go to the shore homes of the Senator and the Executive Director around this time and wiped their computers there. In May 2006, the FBI examined these computers and the Senator's computer at his Florida residence in order to determine whether there is evidence that they were wiped. Forensic examiner Price examined the computer utilized by the Executive Director at her shore house and confirmed that a SecureClean wipe was in fact performed on February 11, 2005. Price examined the Senator's desktop and laptop computers that were maintained at his shore house on Kenyon Avenue in Margate, New Jersey. Price determined through forensic analysis that both of these computers received operating system upgrades to Microsoft Windows XP on June 14, 2005 (laptop) and on August 3, 2005 (desktop) that resulted in a complete wipe of the hard drives and which therefore makes it impossible to determine when or if earlier wipes had been performed. Price also examined the Senator's desktop computer that he used at his vacation home in Florida and found similar results. A Microsoft Windows XP upgrade was performed on the Florida desktop computer on June 14, 2005, thereby making it

impossible to determine when or if earlier wipes had been performed. No e-mail was found on any of the Senator's computers at the shore or in Florida.

97. An e-mail at 1:15 p.m. that same day from Luchko to Person No. 1 titled "Laptop Mania" states that the full wipe damaged the "Kenyon Ave laptop"¹⁹ -- it "did the exact same thing [the Executive Director's] did they are both fucked!"
98. On Saturday, February 12, 2005, Luchko wrote an e-mail to Person No. 1, with a copy to Eister, explaining how he was planning to repartition the laptops to permit faster wipes.²⁰ At 8:36 p.m. that same day, in an e-mail exchange with Eister, Luchko stated, "if I see one more laptop tonight I will go crazy I have been working on these things since last night almost done they are running really well now plus they are very clean"
99. Forensic examiner Price determined through forensic analysis that the Senator's IBM laptop hard drive, which he kept at his residence in Philadelphia, was wiped using SecureClean on February 12, 2005 and February 16, 2005, dates which are just two days after the FBI imaged the Executive Director's Organization computer and PC card and just two days before the search warrant of the Senator's legislative office was executed.

¹⁹ The Senator's home in Margate, New Jersey is located on Kenyon Avenue.

²⁰ I am informed that a computer hard disk may be "partitioned" into sections or drives. Such drives on a Windows system are commonly referred to by letter, such as "C:", "D:", "E:," etc. "Repartitioning" is the process of creating or changing the size and sequence of partitions on the disk.

100. On February 17, 2005, Luchko sent an e-mail to the maker of a product called “Easy Recovery” asking if it could restore e-mail or files from a hard drive which has had a PGP wipe.
101. At approximately 5:00 p.m. on February 18, 2005, FBI and IRS agents executed a search warrant on the Senator’s Philadelphia district office on Tasker Street. Later that evening, FBI forensic examiner Price and an FBI agent drove to Harrisburg to meet with Eister and obtain the server that supported the Senator’s office in the State Capitol.²¹
102. The focus on deleting e-mail continued even after the search. Just nine days later, on February 27, 2005, Luchko sent an e-mail to Eister that states in part, “The Boss told me that he doesn’t want ANY mail stored on our server in Harrisburg.” Luchko then described a proposed policy in which Eister would set up a procedure on the Senator’s server that would delete any e-mail left on the server for more than seven days. In response to this e-mail, Eister replied in part:

. . . First off I want to say to you this is fucking ridiculous. If this happens again they will still take the goddamn server on top of taking a whole fleet

²¹ When agents arrived at the Senator’s Philadelphia office on February 18, 2005, forensic examiner Price found that a SecureClean wipe was running on Luchko’s computer, after Luchko had left for the day. Luchko, who returned to the office during the search, said he started it before he left, and that he did such a wipe regularly.

A PC card obtained from Luchko’s house during the execution of a search warrant there later in 2005 shows that a PGP Free Space Wipe was run on the PC card on February 19, 2005, one day after the search warrant regarding the Senator’s district office was executed.

of computers as that is where the email really is spread out to. . . . I am a little pissed right now. I don't like moving backward to accommodate paranoia. Use fucking PGP and if you don't trust that then don't type it into a fucking computer. That's the ONLY way to guarantee data safety; don't create the fucking data in the first place!

103. On March 8, 2005, Person No. 4 wrote to Luchko, Person No. 1, and Eister:

Just got back from seeing him:
Roe and Chris -
they are to keep their mail popped to their card. [The Senator] assumes they use it EXACTLY as he does - where at all locations they use their card - on their laptop, on their home pc and that NO mail is saved anywhere else.

104. On March 18, 2005, Luchko wrote an e-mail to Eister stating that he wiped the Blackberry of Person No. 6, who is one of the Senator's legislative assistants in Philadelphia who had some involvement in matters that are relevant to this investigation.

105. On March 21, 2005, Person No. 4 sent an e-mail to three of her subordinates in SDCS describing an "Email Project" that the Senator wanted her to undertake:

The email project has taken a turn. Here are the new specs, as per [the Senator].

1) I am to talk individually to each Senator. Each Senator will determine what their retention period is suppose to be.

2) [The Senator] wants a guarantee that all mail that is deleted cannot be recovered. - that means we have work to do - because from what I understand, if you delete it, but the recipient doesn't, or vice versa, it is still really there - so, how do we accomplish his demand????

Lenny apparently does a purge - total wipe - of his server so that things that are deleted are actually gone and can't be recovered - [the Senator] wants assurance that this is also the case with email deleted off the GW system.

106. On March 23, 2005, Eister sent a message to the Senator, with a copy to Luchko, Person No. 1, and Person No. 4, saying that he had been researching security for the e-mail server. He explained that a complete wipe of e-mail takes time, requires

the server to be offline for a portion of the time, and slows down the system for anywhere from 8-24 hours. Eister suggested that he do this weekly, on the weekend. Luchko replied to Eister and the Senator, with a copy to Person No. 1 and Person No. 4:

I agree with Mark on a PGP free space wipe once a week. Doing PGP wipe on a daily basis just isn't practical. You have to remember just what a PGP free Space wipe entails you are literally overwriting the entire hard drive 7 times you do that every day and your hardware just will not take it. We did a once a week PGP free space wipe at Tasker street and it worked fine our main vulnerability was that we had to manually check to make sure [the Senator's] mail was deleted and not stored on the server. This problem is being addressed with the auto delete of [the Senator's] mail feature. I don't know a lot about this FBI investigation but from what I have observed is the FBI are not looking for mail that was sent this week or last week or even last month but from 2002. If we are wiping the server once a week and the [the Senator's] mail is getting auto deleted then the only mail they are going to get is going to be under a week old is it perfect no but I don't think you can get perfect and be practical.

107. On April 1, 2005, Luchko reported to Eister in an e-mail that he switched Person No. 7, another legislative aide of the Senator in Philadelphia who had some involvement in matters that are the subject of this investigation, to another Blackberry device, and wanted to give Person No. 7's old device to another staffer of the Senator. Luchko sought Eister's advice as to what he should do to make this switch. Eister's reply to Luchko was as follows: "Wipe it then reactivate it. Ill set passwords."
108. Person No. 1 testified that the destruction of evidence and wiping of computers continued unabated for at least six weeks after the execution of the search warrant at the Senator's district office:

Q. Why after the search warrant was executed didn't you and the others immediately stop deleting mail and stop wiping the computers?

A. Nobody told us otherwise.

Q. So I think you told me earlier there was a period of time when I think you said about how long, six weeks?

A. Roughly.

Q. So basically for six weeks after the warrant was executed nothing changed; is that right?

A. Correct.

Q. You continued doing wipes?

A. Yeah.

Q. Continued deleting email?

A. Yes.²²

109. Person No. 1 testified that, prior to 2004, there had never been a schedule for performing a free space wipe. Also, on June 2, 2003, Person No. 1 had written in an e-mail that at that time PGP encryption was employed only on a "use when necessary" basis.

110. Person No. 1 testified in the grand jury that he and Luchko engaged in the following types of activities as part of this effort to prevent the FBI from obtaining any of the evidence it was seeking as part of its criminal investigation: (a) creating

²² In fact, evidence obtained later by the government revealed wipes which occurred even later. One of the Senator's PC cards was wiped with the SecureClean utility on June 17, 2005; and Luchko's laptop computer, which was seized from his home, was wiped using SecureClean on September 2, 2005, which is just over a month before the search of his house occurred.

a formal schedule to run a “PGP Free Space Wipe” program that erases any trace of deleted electronic files on computer hard drives and servers; (b) instructing all of the Senator’s employees that under no circumstances were they to save any e-mail sent to or received from the Senator; (c) logging into the e-mail accounts of the Senator’s employees to scan their e-mail to determine that they were not, in fact, saving any e-mail relating to the Senator; (d) erasing other electronic equipment, such as the Blackberry communication devices used by the Senator and the Executive Director, among other persons; and (e) encouraging the Senator’s employees to be vigilant in ensuring that all of their communications were encrypted using the PGP encryption software.

111. Forensic analysis of the Senate computers to which the FBI gained access in February 2005 confirmed that numerous wipes, using the PGP and SecureClean programs, were run after the federal investigation became known, in order to assure that deleted e-mail and other deleted documents could not be recovered.
112. Forensic examiner Justin Price informs me that when the PGP Free Space Wipe utility is executed, a temporary file is created. This temporary file contains random characters which are used to over-write unallocated clusters and file slack. When created, all date and time stamps are captured, *i.e.* “Creation,” “Modified,” and “Accessed.” The temporary file name “pgpwipepattern.tmp” is normally deleted upon completion of the wiping process. However, the file name, attributes, and content are recoverable through expert forensic analysis. Therefore, it is possible to determine the last date on which the PGP Free Space Wipe utility was executed

even though the wiping process over-writes the hard drive and results in the deletion of even the temporary PGP file. Forensic examiner Price analyzed the computer equipment obtained as evidence in this investigation and was able to determine that the PGP Free Space Wipe utility was in fact executed on a number of occasions.

113. For example, forensic examiner Price determined that the file server at the Senator's district office on Tasker Street was last wiped using PGP Free Space Wipe on November 6, 2004. Price determined that the Senator's office computer on Tasker Street was last wiped using the PGP wipe utility on May 6, 2004. Person No. 1's computer at the Senator's district office was last wiped with the PGP wipe utility on December 29, 2004. The district office computer of Person No. 8, a member of the Senator's Philadelphia staff, was last wiped with the PGP wipe utility on December 30, 2004. Forensic analysis also confirms that the district office computer of Person No. 9, another member of the Senator's Philadelphia office staff, was last wiped using the PGP wiping utility on May 5, 2004. Person No. 6's district office computer was last wiped with the PGP wipe utility on May 5, 2004. A PC card obtained from Luchko's house during execution of a search warrant there shows that a PGP Free Space Wipe was last run on the PC card on February 19, 2005, which is just one day after a search warrant regarding the Senator's district office was executed. In sum, PGP wipes were run on numerous relevant computers after the Senator and his staff, including Luchko

and Eister, learned in January 2004 of the FBI's interest in events which predated 2004.

114. Forensic examiner Price informs me that, with respect to SecureClean, when this wiping utility is executed, a temporary file is created. When created, all date and time stamps are captured, *i.e.* "Created," "Modified," and "Accessed." The temporary file named "SC00###.T~P" is deleted upon completion. The file's name and attributes appear to be the only recoverable traces of its existence. This would indicate the temporary file is created, deleted, and wiped by its own function. The file's name and attributes are recoverable only because this data resides in a different location on the hard drive. In addition, SecureClean log files are created when the utility is executed and it is therefore possible to determine the dates on which the utility is run.
115. A forensic examination of the Senate computer equipment obtained in the course of this investigation confirms that the SecureClean wipe utility was executed after the FBI's investigative interest became known to Luchko, Eister, and others in January 2004. For example, forensic examiner Price determined that the Senator's office computer on Tasker Street was wiped using the SecureClean utility on February 4, 2005. One of the Senator's PC cards was wiped with the SecureClean utility on June 17, 2005. Luchko's office computer at the Tasker Street office was wiped using SecureClean on February 18, 2005, January 31, 2005, November 10, 2004, and June 11, 2004. Another Luchko computer he referred to as his "test" computer at the Tasker Street office was wiped with SecureClean on August 6,

2004, May 25, 2004, and May 11, 2004. Luchko's laptop computer, which was seized from his home, was wiped using SecureClean on September 2, 2005, which is just over a month before the search of his house occurred. Forensic examiner Price also determined through forensic analysis that the Senator's IBM laptop hard drive, which he kept at his residence in Philadelphia, was wiped using SecureClean on February 12, 2005 and February 16, 2005, dates which are just two days after the FBI imaged the Executive Director's Organization computer and PC card and just two days before the search warrant of the Senator's legislative office was executed. Price also determined that the Executive Director's computer that she kept at her home at the shore was wiped using SecureClean on February 11, 2005.

116. Forensic examiner Justin Price also examined the computers in the Senator's office in the State Capitol in Harrisburg to attempt to determine if any of the computers there were wiped using either PGP Free Space Wipe or SecureClean. Price determined that one of Mark Eister's desktop computers was last wiped using PGP Free Space Wipe on June 10, 2004. The desktop hard drive of Person No. 11 was last wiped using PGP wipe utility on March 15, 2005. The laptop hard drive of Person No. 10, another member of the Senator's staff in Harrisburg, also appears to have been wiped, according to Price. Although no temporary file was recovered from this machine, there are indications of a wipe due to the fact that repeating patterns of random characters are observed throughout the hard drive's unallocated space. An additional laptop hard drive in the Senator's Harrisburg office with serial number 64MT7742 was wiped using SecureClean on January 25, 2005.

117. Forensic examiner Price also observed other suspicious activity with respect to the computers that are used by the Senator's staff in Harrisburg. Eight of the desktop computers located at the Senator's Harrisburg office were upgraded between December 8, 2004 and February 4, 2005 to Microsoft Windows XP. This upgrading procedure consisted of restoring a baseline image to each of the computer's hard drives. When a large number of computers are to be upgraded, it is a common practice to install the Windows operating system on one computer along with any other software to be utilized by the office staff. Once complete, the computer is copied and restored to any number of computers needing an upgrade. This process could be referred to as cloning one computer system to many. Although convenient and efficient, this is a very destructive task because any data that once existed on the hard drives is over-written with the baseline image. Once this data is over-written, it is not recoverable. This destructive procedure could have been avoided at minimal cost if new hard drives were issued instead of re-using the original hard drive within the computer system. The upgrades that occurred between December 2004 and February 2005 had the same effect as a wipe. The procedures utilized to upgrade the Harrisburg office computers also make it impossible for forensic examiner Price to determine if and when a wipe utility was installed or executed on those computers prior to the upgrade taking place.
118. On October 14, 2005, Person No. 1 told me that, during the execution of the February 18, 2005 search of the Senator's district office on Tasker Street, the

agents did not seize two PC cards that Person No. 1 had been using as part of his duties as an employee of the Senator because those cards were in his possession and were not at the Tasker Street office at the time of the search. He also stated that Leonard Luchko's PC card (a high capacity electronic data storage device) had not been taken by the agents. These PC cards store electronic data files, are removable from the hard drive of any computer, and can be easily transported from place to place. Person No. 1 had never turned these PC cards over to the attorneys for the Senator even though they were subject to the February 18, 2005 search warrant and grand jury subpoena.

119. On October 18, 2005, Person No. 1's attorney produced to the government both of Person No. 1's PC Cards after receiving a grand jury subpoena requiring their production. On October 19, 2005, FBI forensic examiner Justin Price conducted a forensic analysis of the contents of Person No. 1's PC cards. Retrieved from the unallocated space of the PC cards I obtained from Person No. 1 on October 18, 2005 is a document that appears to be drafted by Leonard Luchko which contains a series of questions and answers relating to Luchko's job duties and responsibilities. In this undated document, which based on the questions and answers, appears to have been drafted in advance of the February 4, 2005 conference call with the government regarding the Executive Director's computer,²³ Luchko states that he "backs up" the computer files for the Executive

²³ Forensic examiner Price determined that this file was created on January 22, 2005 and was located on the Senator's PC card and in the unallocated space of Person No.

Director, and keeps the “backups” at “[m]y house . . . in case of a disaster at [the Organization].” Luchko also states that he destroyed backup tapes for the computers at the Senator’s district office on Tasker Street because “[Person No. 1] and I had a meeting and decided to destroy them” because “[w]e are not allowed to save any of the Senator’s email[.] I check everyone’s PC to make sure that no one is saving any of the Senator’s email. So if people were getting rid of his email like they were supposed to it didn’t make any sense for me to save a Year End backup.”

120. On October 20, 2005, I obtained and executed a search warrant for the home of Leonard Luchko and seized additional computer equipment, including 6 PC cards, Luchko's Blackberry device, Luchko’s Senate issued laptop computer, and Luchko’s home desktop computer.

V. RESULTS OF THE CONSPIRACY TO OBSTRUCT JUSTICE

121. Person No. 1 testified in the grand jury that he believed that the efforts to destroy the Senator’s e-mail were successful:

Q. And as far as you know between you and Luchko and Eister, the three of you had successfully destroyed all e-mails to and from [the Senator] that you were able to get rid of?

A. Correct.

122. In the course of this investigation, the FBI seized or otherwise obtained computer equipment from the Senator’s offices on Tasker Street and in Harrisburg, and also

1's PC card.

the Organization's office at Wharton Street. In total, a forensic examination and analysis of one e-mail exchange server, one file server, 16 desktop and laptop computers, and 17 PC cards from these locations was performed. In addition, attorneys representing the Senate and individual Senate employees have produced e-mail to the government in response to subpoenas. The custodian of records of the Senator's office, working with a data recovery expert retained by the Senator's attorneys, has represented to the government that the government has received all existing and pertinent e-mails within the scope of the subpoenas and search warrant served upon the Senator's office that are maintained on computers assigned to the Senator and his staffers.

123. Excluding duplicate versions of e-mail on the Senator's PC cards, a total universe of approximately 84,000 recoverable e-mail communications were identified and examined. An examination of all of this data reveals an extremely limited amount of e-mail involving the Senator and his relationship with the Organization preceding February 2005. Of the approximately 1,000 e-mails residing on the PC card of the Executive Director of the Organization, the vast majority have nothing to do with Organization business and only about 60 of the 1,000 e-mails are dated before January 1, 2005. The Executive Director's desktop computer contained only 129 e-mails, all of which belonged to the Executive Director's daughter, an employee of the Organization. Of that amount, only 23 e-mails concerned the business affairs of the Organization, and none was sent or copied to the Senator. The Executive Director herself retained no e-mail at all on her desktop computer.

124. Of the approximately 84,000 e-mails recovered across all of the computer equipment, fewer than 125 pertain to the Organization at all and of that amount, even fewer are pertinent to any of the issues relevant to this criminal investigation. This confirms that the effort to destroy such communications was successful.
125. Further proof of the success of the conspiracy to obstruct justice comes from the fact that the FBI has been able to recover from other third party sources e-mail which predates 2004 and which demonstrates that the Senator was directly involved in managing and controlling the affairs of the Organization. For example, the government is in possession of numerous e-mail communications in which the Senator is a sender or a recipient and which demonstrate that he instructed the Executive Director to use the Organization's funds to pay for projects and causes that were important to the Senator. All of these e-mails were obtained from third party sources and were not found on any of the computers or servers obtained from the Senator's offices or from the Organization.
126. For example, a September 13, 2000 e-mail exchange between the Senator and one of his former aides addresses a number of issues of central importance to this investigation, including the extent to which the Senator uses the Organization's funds to support political candidates or political issues. The Senator's former aide recommends in this e-mail that the Senator agree to expand the size of the Organization's staff and put in place a "new permanent and full time management team." The Senator's e-mail response is as follows:

Yes, that would be nice but then it would cost us a lot more and CONFIDENTIALLY (only because I trust you) if we had such a person and tried to do some of the things that are political that we do, we would now have someone else "in our tent" and we would be subject to his blackmail if they so chose to do it."

This e-mail was never found in any of the Senator's or the Organization's office computers or exchange servers.

127. I have also obtained from third party sources (but not from any of the Senator's or the Organization's office computers) many other e-mail communications that demonstrate that the Senator controls and directs the Organization's payments to persons and entities that are important to the Senator – issues of central importance to this investigation. For example and by way of illustration only: (a) a November 20, 2000 e-mail authored by the Senator in which he directs an aide to use the Organization's funds to pay for the repair of a police surveillance van; (b) a January 8, 2001 e-mail authored by the Senator in which he directs an aide to use the Organization's funds to pay for a \$25,000 program in Pittsburgh that will help garner political support for a politician there whom the Senator supported; (c) a January 9, 2001 e-mail authored by the Senator in which he directs an aide to use the Organization's funds to pay for a police surveillance van to be used in the Senator's neighborhood in Philadelphia and which would be donated by another public official supported by the Senator so that the public official could get some positive publicity; (d) a January 12, 2001 e-mail authored by the Senator in which he directed an aide to use the Organization's funds to pay for a bill for the Christopher Columbus Charter School; (e) a February 22, 2001 e-mail authored by

the Senator in which he directs an aide to use the Organization's funds to make a \$5,000 donation to the Citizens Crime Commission; (f) an April 29, 2001 e-mail authored by the Senator in which he directs an aide to use the Organization's funds to pay for a student retention program supported by the Senator which the Senator believed would provide him with certain political benefits or advantages; (g) a series of e-mail communications in 2000 and 2001 in which the Senator directs the Organization to purchase various properties in South Philadelphia and in which the Senator instructs an aide that he alone would decide which properties are to be purchased by the Organization ("Take all of their calls as suggestions and I will give final approval. Give me the suggestions and who suggested it and why they suggested it and I will decide."); (h) a November 2001 e-mail in which the Senator directs an aide to use \$50,000 of the Organization's funds to pay for a memorial in Bucks County in order to shore up political support for a candidate for public office there that the Senator was supporting; and (g) e-mail between Person No. 10 and an outside attorney who was paid with funds from the Organization to pursue a lawsuit in 2001 against another state senator who was a longtime political rival of the Senator.

128. The government is also in possession of an e-mail dated May 6, 2003 that pertains to the payment of polling expenditures by the Organization, which is an issue at the very center of this investigation. The Senator and the Executive Director are both recipients of this e-mail, which the government was only able to recover from a third party source who prepared and retained the e-mail communication. This

crucial piece of evidence is nowhere to be found on any of the Senator's or the Organization's computer equipment, even though it was routed through the Senator's e-mail exchange server and was sent as well to the Executive Director of the Organization. The complete absence of such e-mail on the Senator's and the Organization's computers suggests that such e-mail was systematically deleted, as the intensive effort described above confirms.

129. With respect to the issue of the payment of political polling expenditures by the Organization, I also obtained from a third party a March 24, 2004 e-mail exchange involving the Executive Director, Person No. 2, and an employee of a political polling company that received a significant amount of money from the Organization, in which the Executive Director tells Person No. 2 that she needs the polling questionnaires and results: "I will talk to you in person why they need it but I need it right away. You remember all the stuff I told you we shouldn't be paying for etc." This e-mail was never found on any of the Senator's or the Organization's computer equipment even though it involved e-mail communication from the Executive Director to Person No. 2, a Senate contractor, who were both using the Senator's e-mail domain.
130. A review of the Senate computers seized in this investigation reveals that, while there appears to have been a massive deletion of e-mails involving the Senator (through deletion of the e-mails and subsequent wiping of the unallocated space on the computers), staffers maintained e-mails dating as far back as 1999, in the course of their work.

131. The Senator himself maintained on his PC cards more than 10,000 e-mails, many of which date as far back as 1998 and 1999. As the supervisor of SDCS had explained in an e-mail quoted earlier, in ¶ 103, the Senator's practice was to maintain no e-mails on his computers, but rather copy e-mails to a PC card which he detached from the computers and kept on his person. The Senator meticulously organized these files into more than 60 separate folders, by subject matter, in a variety of categories, including business and personal, none of which pertains to his relationship with the Organization. None of the e-mail correspondence relating to the Organization which was obtained from third-party sources and which is described above was found on the Senator's PC cards, nor was any of the e-mail quoted in this affidavit regarding the deletion of e-mail.
132. As stated earlier, the e-mails described in this affidavit, except in the few instances noted, were located in computer equipment or accounts assigned to Luchko, Eister, or Person No. 1. None of the e-mail was located in computer equipment or accounts belonging to the Senator, and with the exceptions described in ¶¶ 83, 84, and 86, none was located in equipment assigned to the Executive Director. In almost every instance, the government located only one copy of any particular e-mail described in this affidavit. In other words, Luchko, Eister, and Person No. 1 did not make any effort to maintain all of their e-mail, but each did retain some, and the government has been able to piece together the chronology presented here from the sum of the retained e-mails.


133. In particular, many of the e-mails described in this affidavit came from a PST e-mail file maintained by Luchko, which, as far as the government's forensic examiners have been able to establish, was not located on any of the computer equipment in Philadelphia and Harrisburg which the FBI seized on February 18, 2005. These records were produced to the government later by attorneys for the Senator, in response to a subpoena. A data recovery expert retained by these attorneys represented to the government that these particular e-mails were located in a PST file in Luchko's name on the Tasker Street server, which was added to the server on February 24, 2005, six days after the FBI conducted its search. It is not known where Luchko maintained these e-mails before February 24, 2005.
134. The fact that Luchko had maintained these e-mails, despite the directive he gave to others to destroy e-mail, was consistent with his statement in his "venting" e-mail on June 7, 2004 (described in ¶ 47), that it pained him to destroy files he created, and that he carried files home with him.²⁴

²⁴ Luchko had written, in part:

I created that system and destroying it REALLY hurt because I know something is going to happen and we are going to have to go back and look at something and boom were screwed and you know who takes the heat when Data Processing things get messed up US! I am walking 1 backup tape in at a time and then bringing it home I am literally walking around with files in my pocket.that's insane, hopefully this will blow over soon but right now I am stressed.

VI. CONCLUSION

135. For the reasons explained above, I respectfully submit that there is probable cause that Leonard Luchko and Mark Eister conspired to destroy evidence for the purpose of impeding and obstructing this investigation, and that each engaged in a series of overt acts taken in furtherance of the conspiracy, in violation of Title 18, United States Code, Section 371.


VICKI HUMPHREYS
Special Agent
Federal Bureau of Investigation

Sworn to and subscribed before
me this 26 day of May, 2006.


HONORABLE M. FAITH ANGELL
United States Magistrate Judge